

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT**

ROSE GRIEGO and KIMBERLY KIEL, and
MIRIAM RAND and ONA LARA PORTER,

Plaintiffs,

v.

No. _____

MAGGIE TOULOUSE OLIVER, in her
official capacity as Clerk of Bernalillo County,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs are committed same-sex couples who seek the freedom to marry in New Mexico. Each Plaintiff couple has committed to build a life and a home together and to share together as a family the joys and hardships that life may bring them. Each of the Plaintiff couples are, and have been for many years, bound to each other by personal commitment and shared responsibility for the happiness, health and well being of one another and, in some cases, their children and other family members. For any different-sex couple that has made such a weighty and enduring commitment, New Mexico provides a legal institution—civil marriage—that honors and supports their bond in countless intangible and tangible ways. Indeed, the institution of civil marriage exists for the very purpose of recognizing such personal and public commitments of two people to each other. But, unlike other couples who have made a similar commitment to one another, New Mexico denies civil marriage to these Plaintiffs for the sole reason that the members of these couples are persons of the same sex. Each Plaintiff has been

denied the freedom to marry the person she loves, and this denial violates Plaintiffs' fundamental rights and liberties under the New Mexico Constitution.

2. Plaintiffs seek a declaration that it is unlawful to deny same-sex couples the freedom to marry on the basis of sex or sexual orientation because such denial deprives them of fundamental rights and liberties, as alleged herein, and otherwise violates the New Mexico Constitution.

3. Plaintiffs seek injunctive relief: (a) that Defendant prescribe and furnish forms for the application for license to marry, the license to marry, and the marriage certificate that do not discriminate on the basis of sex or sexual orientation; and (b) that Defendant implement and enforce all aspects of the state's marriage law, NMSA 1978, Chapter 40, Article I, without discriminating on the basis of sex or sexual orientation, including without limitation that Defendant take all steps necessary, including the preparation and issuance of detailed instructions as may be required, to procure the uniform observance of NMSA 1978, Chapter 40, Article I, without discrimination on the basis of sex or sexual orientation.

JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter of this action pursuant to the New Mexico Constitution, art. VI § 13, and NMSA 1978 § 44-6-1 et seq. This Court has personal jurisdiction over Plaintiffs and Defendant.

5. Venue is proper in this Court pursuant to NMSA 1978 § 38-3-1 because Defendant's offices are located in this county, and because the acts and events giving rise to this Complaint occurred in this county.

PLAINTIFFS

Rose Griego and Kimberly Kiel

6. Plaintiffs Rose Griego (“Rose”), age 47, and Kimberly Kiel (“Kim”), age 44, have maintained an intimate and committed relationship of mutual protection and support for the past eight years. They live together in Santa Fe. Kim is a financial advisor with an independent private practice; Rose is an accountant by trade and owns her own accounting business.

7. Kim and Rose had a traditional commitment ceremony for about 130 guests at the Folk Art Museum in Santa Fe in October of 2010. The ceremony was a momentous occasion for Rose and Kim because it allowed them to have their families and friends bear witness to their declarations of love and commitment to one another, but their joy in celebrating their union was somewhat tempered by the state’s failure to recognize their relationship.

8. Kim and Rose have experienced firsthand the importance even to intimate family members of the legal and social status of marriage. Rose’s sister died a few years ago, and her family did not allow her sister’s boyfriend of ten years to keep any of her belongings after her death or allow him to participate in the decision making surrounding her funeral arrangements. Rose was astonished that her family kept pointing to the couple’s failure to marry in response to her pleas to allow her sister’s long-term boyfriend access to her sister’s belongings. Rose does not fault her family, but the experience was instructive, and the couple came to understand the importance of marriage to others: marriage serves as notice that a couple is truly committed, truly family. After the experience, Kim and Rose hired an attorney to put every legal document in place that they could in an attempt prevent a similar situation from happening to one of them.

9. Before they spent the thousands of dollars necessary to duplicate only some of the rights married couples automatically enjoy, Rose was hospitalized. Even though Kim had taken

her to the emergency room, the hospital refused to provide Kim with any information about Rose's condition or treatment. It was only after Rose's family arrived that Kim was able to learn Rose's prognosis.

10. Kim has two children from a previous relationship, who are now in college. Her children refer to Rose as their step-mother. Her children recognize the couple's love for and commitment to one another, but Kim and Rose want everyone else to recognize the same. Kim and Rose want to get married, but are unable to do so in New Mexico.

Miriam Rand and Ona Lara Porter

11. Plaintiffs Miriam Rand ("Miriam"), age 63, and Ona Lara Porter ("Ona"), age 66, have maintained an intimate and committed relationship of mutual protection and support for the past twenty-five years. They live together in Albuquerque, New Mexico. Miriam is the owner of Family Matters, LLC, and assists families through the process of adoption, and Ona is the President and CEO of Prosperity Works, a state wide non-profit which focuses on eliminating poverty, building assets for the poor, and challenging racial, gender and class inequities.

12. When they first started dating, Miriam had one daughter from a previous relationship and Ona had two, all of whom are now adults. From the time they combined households, Miriam and Ona loved each other's children as if they were their own. Their youngest daughter who was just three when they combined families went so far as to go to court to change her surname to Porter-Rand in order to reflect the importance of both of the mothers in her life.

13. Miriam and Ona's middle daughter, Cherif, who is now 41, is debilitated by multiple sclerosis. Miriam and Ona are caring for Cherif, and Ona has adopted Cherif's fourteen-year-old daughter, who herself has cerebral palsy, because Cherif is no longer able to

care for her daughter as a result of her disability. Miriam plans to initiate a second parent adoption to ensure that if something were to happen to Ona, their granddaughter would be protected. Although Miriam, Ona, and their granddaughter are a family to all that know them, as individuals, Miriam and Ona do not have automatic legal authority to make important decisions for one another or their child, and they have had to pay significant legal bills to protect their relationship and prove it to others, unlike different-sex couples who can simply marry.

14. Both Miriam's and Ona's mothers died within a year of each other. Before they died, Miriam and Ona cared for each other's aging parents. Even though Miriam and Ona shared the responsibility of their mothers' end of life care, they were faced with restrictive next of kin and family only limitations on visitation and decision making. To facilitate the familial responsibility they had taken on together as a couple, they were forced to pretend to be sisters.

15. Despite the fact that Miriam and Ona cared for each other's mothers as a family, when Miriam's mother died, Ona was not eligible for bereavement leave; and when Ona's mother passed, Miriam was also ineligible.

16. In the year, Miriam and Ona have suffered through the serious illnesses and deaths of several other family members, including Miriam's sister, Miriam's brother-in-law and Ona's brother. The denial of marital rights hampered Miriam and Ona's abilities to visit, to make decisions for, and to care for each other's siblings.

17. Miriam and Ona celebrate their anniversary on the day they signed a mortgage together. On the subject of their anniversary date, they say "it says little about the life of unimaginable love that we have shared for more than 25 years, the children we have raised together, the mothers we have nursed and then buried, the granddaughter we have adopted and whose opportunity for a future of independence, happiness, and productivity is dependent upon

our consistent attention to every developmental opportunity that we can manage, or the grown daughter for whom almost total care is essential and ever changing. But that contract is what we have.” What they want, however, is the state’s legal recognition of their deep commitment to one another and their family. Miriam and Ona want to get married, but are unable to do so in New Mexico.

DEFENDANT

18. Defendant Maggie Toulouse Oliver is sued in her official capacity as Clerk of Bernalillo County. As County Clerk, Defendant is charged with furnishing applicants with the application for license to marry, the license to marry, and the marriage certificate, see NMSA 1978, §§ 40-1-10, to 40-1-19, and more comprehensively, with implementing and enforcing compliance with the marriage eligibility requirements set forth in NMSA 1978, Chapter 40, Article 17.

PLAINTIFFS’ ATTEMPTS TO OBTAIN MARRIAGE LICENSES

19. On March 21, 2013, each of the above-named Plaintiff couples appeared at Defendant’s offices. Each Plaintiff couple had proper identification, and was prepared to complete the application and to tender the appropriate fee. Each Plaintiff couple spoke briefly with an employee of the Defendant’s office who is responsible for issuing marriage licenses, and explained that they wanted to apply for a marriage license.

20. For each couple, the Defendant’s employee, acting upon behalf and under the authority of Defendant, stated that he or she could not issue them a license because the couple was of the same sex or because of the sexual orientation of each couple.

21. Each Plaintiff individually and each Plaintiff couple is otherwise qualified to contract to marry and to be married under the laws of State of New Mexico in that each Plaintiff is over the age of eighteen, no Plaintiff is part of an existing marriage, and neither Plaintiff couple is related to each other within the degrees of kinship set forth in NMSA 1978 § 40-1-7.

GENERAL ALLEGATIONS

New Mexico's Historical Discrimination Against Lesbian and Gay People

22. Each Plaintiff identifies as a lesbian. Lesbian and gay people, including Plaintiffs, are members of a minority group that historically has been discriminated against in New Mexico and subjected to unequal treatment by the law and society solely because of their sexual orientation—a factor which bears no connection to the ability of the individual to lead a productive life or to contribute to society. Despite recent progress in eliminating anti-gay discrimination, lesbians and gay men remain a politically disadvantaged minority group.

23. For example, until 1975, New Mexico criminalized consensual sexual intimacy between persons of the same sex. Numerous convictions were upheld by the courts of this state, which repeatedly rejected the arguments of criminal defendants that the statute violated their constitutional rights by subjecting them to punishment solely for private, consensual intimate conduct. *See State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976) and numerous cases cited therein. By criminalizing for many decades the most private and intimate aspects of lesbian and gay people's lives, the state marked them as outcasts and invited public and private discrimination in all aspects of their lives.

24. New Mexico also lacked any state laws protecting lesbian and gay people against discrimination until 2003. These protections were enacted only after advocates had fought for more than a decade to secure passage of antidiscrimination legislation. Bills prohibiting sexual

orientation discrimination were introduced and ultimately defeated by opponents in 1991, 1993, 1997, 1999, and 2001. *See* S.B. 91 (1991); N.M. H.B. (1993); H.B. 277 (N.M. 1999). H.B. 360 (N.M. 2001). For decades prior to the 2003 legislation, lesbian and gay people had no legal recourse if they were fired from a job, denied an apartment, or refused service by a business. Moreover, while state law now provides some recourse, even after antidiscrimination legislation was enacted, lesbian and gay people continued to face discrimination in employment, public accommodations and other areas, including state employees who faced adverse employment actions on the basis of their sexual orientation. *See* Williams Institute, New Mexico—Sexual Orientation and Gender Identity Law and Documentation of Discrimination (Sept. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/NewMexico.pdf>.

25. Lesbian and gay people in New Mexico likewise have been unable to secure legislation that would provide legal recognition to their relationships. Bills to establish domestic partnerships for same-sex couples were defeated in 2005, 2007, 2008, 2009, and 2010, in many cases without ever having been brought to a floor vote in the Senate. In short, lesbian and gay New Mexicans have long faced discrimination at the hands of state government, and have remained unable to end state-sanctioned discrimination through the political process.

The Harms of New Mexico's Exclusion of Same-Sex Couples from Marriage

26. Plaintiffs and their families are harmed in numerous ways by the exclusion of same-sex couples from the freedom to marry in New Mexico.

27. Marriage plays a unique and central social, legal, and economic role in American society. Being married reflects the commitment that a couple makes to one another, as well as representing a public acknowledgement of the value, legitimacy, depth, and permanence of the

married couple's private relationship. Marriage is also the sole legal institution in New Mexico through which couples can create a family unit that the state recognizes and protects.

28. Conversely, denial to some couples of the status of being married in the eyes of the State conveys the State's view that the couple's private relationship is of lesser value and unworthy of legal recognition and support. This public rejection of the Plaintiffs' most significant relationship damages them and their children, and promotes the view that their relationships and families are inferior to those of other committed couples.

29. New Mexico also provides a broad array of statutory protections, benefits, and mutual responsibilities for couples electing to be married pursuant to NMSA 1978 § 40-1-1. The exclusion of same-sex couples from the right to marry in New Mexico causes Plaintiffs numerous tangible harms, as Plaintiffs are denied the public and private safety net that attaches to marriage. The harms to Plaintiffs from New Mexico's marriage discrimination include the following, among others:

a) Plaintiffs are denied protections afforded married couples upon the death of a spouse, such as intestacy rights permitting the surviving spouse to inherit automatically from the deceased spouse's estate; the ability of the surviving spouse to elect a minimum percentage of the deceased's estate based on the length of the marriage even if there is a will; the right of the surviving spouse to family and personal property allowances; the right of the surviving spouse to file a wrongful death lawsuit when a spouse is killed; and presumptions benefiting spouses in the absence of a designated beneficiary for death and disability benefits and life insurance policies.

b) Plaintiffs are denied protections afforded employee spouses to file for or receive workers' compensation death benefits, even though as employees, they pay

insurance premiums for workers' compensation benefits intended to provide protections to employees and their dependents if the employee is injured or killed on the job, and may pay precisely the same taxes and insurance premiums as their co-workers.

c) Plaintiffs are denied the financial safety net provided to spouses under numerous tax laws, including the right to file jointly to reduce tax liability and tax benefits related to the ownership of real or personal property.

d) Plaintiffs may be denied the full benefit of community property protections that apply if spouses separate or divorce, as well as the laws that determine custody, visitation, support and other matters.

e) Plaintiffs are denied the automatic right to make health care decisions for a spouse when the spouse cannot, including the right to withhold or withdraw life-sustaining procedures and the right to donate a spouse's organs and tissues, and Plaintiffs are denied the right afforded to spouses to have priority over all others to become the court-appointed guardian for a spouse who becomes mentally incompetent.

f) Plaintiffs are denied the automatic right to make burial decisions and other decisions concerning the disposition and handling of remains of deceased spouses.

g) Many private entities in defining family members who are eligible for valuable benefits do so by reference to the State's statutory scheme, which provides relationship and family protections and obligations for different-sex couples who marry but not for similarly-situated same-sex couples. As a result, solely because they are in same-sex relationships, Plaintiffs may be excluded from other important family protections and obligations, such as employer-provided health insurance for family members.

30. As a result of Defendant's actions, Plaintiffs have been denied both the intangible and tangible benefits of being married under New Mexico law.

Excluding Same-Sex Couples from Marriage Violates the New Mexico Constitution

31. The Constitution of New Mexico requires the state to provide every person with due process and equal protection of the laws. N.M. Const., art. II, §18. This requirement is independent of, and may provide more protection than, the limitations placed on the powers of states in the Fourteenth Amendment to the United States Constitution. Breen v. Carlsbad Municipal Schools, 2005-NMSC-028, ¶ 14, 138 N.M. 331.

32. There is no federal law analog to the State's marriage licensing statutes. The Congress of the United States is neither empowered to pass marriage licensing statutes nor to establish a state's requirements for the issuance of marriage licenses by that state.

33. The Constitution of New Mexico provides that "all persons are born . . . with certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty . . . and of seeking and obtaining safety and happiness." N.M. Const., art. II, § 4. This guarantee is independent of the United States Constitution. The United States Constitution contains no specific guarantee of the right to seek safety and happiness analogous to Article II, § 4 of the New Mexico Constitution.

34. The Constitution of New Mexico contains what is commonly called an "equal rights amendment" which states that "[e]quality of rights under law shall not be denied on account of the sex of any person." N.M. Const., art. II, § 18. Although the United States Constitution's equal protection provisions have been construed to limit the extent to which federal and state governments can discriminate on the basis of sex, that Constitution contains no analog to the New Mexico equal rights amendment.

35. New Mexico public policy is found in the Constitution, statutes, court decisions and rules of the state. That public policy makes manifest that, in New Mexico, the law may not discriminate against persons on the basis of their sexual orientation. Without limitation, that public policy provides as follows:

a) The Human Rights Act, NMSA 1978 § 28-1-1 et seq. makes it unlawful for any person, employer (with more than 15 employees), employment agency, labor organization, lender or credit entity, or public accommodation to discriminate in the provision of their respective services or benefits on the basis of sexual orientation.

b) Law enforcement officers may not profile or alter their investigatory behavior on the basis of sexual orientation. NMSA 1978 § 29-1-2.

c) The law provides additional and enhanced penalties for those who commit crimes motivated by prejudice against, among other things, the victim's sexual orientation. NMSA 1978 § 31-18(B) 2 and 3 (2007).

d) Notaries public may not refuse to perform their services on the basis of sexual orientation. NSMA 1978 § 14-12A-8 (2003).

e) The Code of Judicial Conduct forbids judges from manifesting in any way a bias against persons on the basis of sexual orientation. Rule 21-300(B), NMRA 2012.

f) No profession, business, or public office licensed or maintained by the State of New Mexico is unavailable to persons because of their sexual orientation.

g) The Governor of New Mexico issued an executive order requiring that the health care and other benefits for spouses of public employees be provided to the same-sex partners of public employees. N.M. Exec. Order No. 2003-010 (Apr. 9, 2003),

available at <http://cdm16256.contentdm.oclc.org/cdm/singleitem/collection/p267801coll5/id/2652/rec/3>.

h) Individuals who are part of same-sex couples are permitted by law to adopt children, including the children of their partner. NMSA 1978 §32A-5-11.

i) New Mexico courts have ruled that New Mexico law does not permit the State to refuse to let a family member take custody of a child from foster care because of the sexual orientation of the family member. State ex rel. Human Services Dept., 107 N.M. 769, 772, 764 P.2d 1327, 1330 (Ct. App. 1988).

j) A partner may seek a declaration that she is a legal parent of a child she has been raising together with a same-sex partner, based on her having held out the child as her own, even if she has not adopted the child. Chatterjee v. King, 2012-NMSC-019, 280 P.3d 283.

COUNT I
(Denial of Equal Protection of the Laws/Sexual Orientation)

36. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

37. Article II, section 18 of New Mexico's Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."

38. Defendant's refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another discriminates against them on the basis of sexual orientation in violation of the Equal Protection Clause of the New Mexico Constitution.

39. Defendant's actions bear no rational relationship to any legitimate state interest, nor do they sufficiently advance any important or compelling state interest.

40. As a result of Defendant's actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

41. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT II
(Denial of Equal Rights on Account of Sex)

42. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

43. Article II, section 18 of the New Mexico Constitution contains an Equal Rights Amendment, which provides that "[e]quality of rights under law shall not be denied on account of the sex of any person."

44. Defendant's refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another discriminates against them on the basis of sex, in violation of the Equal Rights Amendment.

45. As a result of Defendant's actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

46. Defendant's actions bear no rational relationship to any legitimate state interest, nor do they sufficiently advance any important or compelling state interest.

47. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT III
(Denial of Due Process of Law)

48. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

49. Article II, section 18 of New Mexico's Constitution provides "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."

50. Defendant's refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another violates their rights to marry, to privacy, to freedom of intimate association, and to other fundamental liberties in violation of the Due Process Clause of the New Mexico Constitution.

51. Defendant has no sufficient justification for abridging Plaintiffs' due process rights.

52. As a result of Defendant's actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

53. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT IV
(Denial of Freedom of Speech and Expressive Association)

54. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

55. Defendant's refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another

deprives Plaintiffs of the freedom of speech and expressive association guaranteed in the New Mexico Constitution, art. II, § 17.

56. Defendant's actions bear no rational relationship to any legitimate state interest; neither are they narrowly tailored to serve a compelling governmental interest.

57. As a result of Defendant's actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

58. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT V
(Denial of Inherent and Inalienable Rights)

59. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

60. Article II, section 4 of New Mexico's Constitution provides that "all persons are born . . . with certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty . . . and of seeking and obtaining safety and happiness."

61. Defendant's refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another deprives Plaintiffs of the inherent and inalienable right to, inter alia, seek safety and happiness in violation of the New Mexico Constitution.

62. Defendant's actions bear no rational relationship to any legitimate state interest, nor do they sufficiently advance any important or compelling state interest.

63. As a result of Defendant's actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

64. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

WHEREFORE, on each and every count of this Complaint, Plaintiffs request that the Court enter judgment in their favor and against Defendant and award Plaintiffs:

- (a) A declaration that NMSA 1978, Chapter 40, Article I, and any other New Mexico statute that excludes otherwise qualified same-sex couples from the right to obtain marriage licenses or to marry in New Mexico, is void and unenforceable because it violates the Constitution of New Mexico;
- (b) A declaration that NMSA 1978, Chapter 40, Article 1, and any other New Mexico statute that excludes otherwise qualified same-sex couples from obtaining all of the rights, privileges, benefits, protections, and obligations available to married couples under New Mexico law, is void and unenforceable because it violates the Constitution of New Mexico;
- (c) A permanent injunction forbidding Defendant, her agents, employees, representatives, and all those acting in concert with her from (i) enforcing the provisions of NMSA 1978, Chapter 40, Article I, in a manner that prevents same-sex couples from marrying; (ii) failing to prescribe and furnish forms for the application for license to marry, the license to marry, and the marriage certificate that do not discriminate on the basis of sex or sexual orientation; and (iii) failing

to implement and enforce NMSA 1978, Chapter 40, Article 1, without discriminating on the basis of sex or sexual orientation;

- (d) A permanent injunction requiring Defendant, her agents, employees, representatives, and all those acting in concert with her to execute and enforce the provisions of NMSA 1978, Chapter 40, Article I without regard to the sex or sexual orientation of the persons who seek enforcement or application of those statutes;
- (e) Costs of suit, including but not limited to attorneys' fees; and,
- (f) Such further relief as the Court deems proper and the law allows.

Respectfully submitted,

SUTIN, THAYER & BROWNE
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